

Fulton County v. Soco Contracting Co., Inc.: Sovereign Immunity May Insulate Counties from Delay Claims; But May Not be Waived in Responses to Requests for Admissions.

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The recent case of *Fulton County v. Soco Contracting Company, Inc.*, No. A17A1001, -- Ga. App. --, 2017 WL 5476597, (Nov. 15, 2017) addresses two important issues for construction attorneys. First, when does sovereign immunity apply to claims of delay, extra compensation, and change orders under a county's written contract? Second, can a county waive sovereign immunity by failing to properly respond to requests for admission (RFAs) or by erroneous admissions?

Substantive Facts

Fulton County ("County") hired Soco Contracting Company, Inc. ("Contractor") to construct the Aviation Community Cultural Center near the Fulton County Airport. The contract provided that adjustments to Contract Time or Contract Sum must be approved by written change order. In addition, change orders must satisfy a county ordinance, which required approval by the Board of Commissioners.

But in emergency situations, the County Manager can approve change orders, as long as, among other requirements, the contractor executes a proposed modification and the Purchasing Agent approves it. Such emergency situations include a loss of substantial resources due to delays.

The project inevitably suffered substantial delays, which Contractor attributed to weather, design delays, delays by the County in providing decisions on changes, and delays in obtaining permits during the federal government's shutdown. As a result of these issues, Contractor claims County changed the scope of the contract and was entitled to an increase in Contract Sum and an extension in Contract Time.

Procedural Facts

Based on the claims, Contractor filed suit against County, serving RFAs with its complaint by hand delivery. County responded to the RFAs 33 days later, which was beyond the 30-day statutory period. The responses were not only late, they contained bizarre and erroneous admissions – admitting Contractor fully performed the contract, admitting its own liability for Contractor's damages, and admitting its own bad faith. As a result, County filed a motion to withdraw the admissions, but the court denied the motion.

Thereafter the parties filed cross motions for summary judgment. The trial court granted Contractor's motion and denied County's motion. It also upheld its prior denial of County's request to withdraw its admissions.

Appellate Rulings

On appeal, County argued: (i) the trial court lacked subject-matter jurisdiction based on sovereign immunity, because Contractor failed to comply with the change-order provision and the incorporated ordinance; and (ii) the trial court should have allowed the withdrawal of its admissions.

Sovereign Immunity Waiver Without Change Orders?

County asserted that the defense of sovereign immunity barred Contractor's claims that it did not comply with the change-order provisions and the incorporated county ordinance. The court generally agreed that sovereign immunity applied to Contractors' claims not based on a written contract, and that sovereign immunity is only waivable by the General Assembly. Thus, the key question is whether the parties entered into a change order in compliance with the contract and the incorporated ordinance.

Contractor admitted that there was no change order executed by the County's Board of Commissioners. Thus, the only way Contractor could recover was by satisfying the emergency exception, along with its procedural requirements under the local ordinance. But, by largely overlooking the procedural requirements, the trial court failed to adequately consider whether Contractor strictly complied with the contract. Thus, the court remanded the case to consider the procedural requirements under the emergency exception.

Sovereign Immunity By Admission?

County also argued that the trial court should have allowed the withdrawal of its admissions. The court reviewed the general rules governing RFAs, including the following: (i) unless withdrawn, RFA admissions are solemn admissions *in judicio* and are conclusive as a matter of law; (ii) RFA admissions may relate to facts or legal conclusions; and (iii) the trial court has broad discretion over whether to allow withdrawal of admissions.

RFA admissions may be withdrawn by satisfying a two-pronged test: (i) presentation of the merits will be subserved thereby; and (ii) the other party fails to demonstrate prejudice from the withdrawal. To satisfy the first prong, a party must show the admissions could be refuted at trial by admissible evidence having a modicum of credibility or the admissions were incredible on their face.

In this case, even though County introduced affidavits to refute the admissions, the trial court found they lacked credibility and were refuted by other statements of County. Finding no abuse of discretion, the court affirmed the trial court's ruling. Thus, the admissions related to Contractor's full performance of the contract and County's bad faith were conclusive.

But as to the admission of County's liability for Contractor's damages, the court reached a different result. This admission effectively resulted in a waiver of sovereign immunity. Yet only the General Assembly can waive sovereign immunity, and only by a clear and express waiver. To allow RFA admissions to waive sovereign immunity, courts would be usurping the authority of the General Assembly. Accordingly, County's RFA admission concerning liability to Contractor could not be given effect.¹

¹ As an additional basis for disallowing the admission, the court found that County did not have knowledge of Contractor's lost profits. A party cannot admit a fact of which it has no knowledge.

Conclusion

Since the case has been remanded back to the trial court, it remains to be seen whether Contractor will actually recover. But the case serves as an excellent reminder of local governments' protection by sovereign immunity – a formidable wall against contractor claims beyond the written contract.

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